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NTSB Order No. EA-4012

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 3rd day of November, 1993

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. PHILEMON K. PLATT, Respondent.	Docket SE-11708

OPINION AND ORDER

Both the Administrator and respondent have appealed from an oral initial decision issued by Administrative Law Judge William R. Mullins at the conclusion of a two-day evidentiary hearing held in this matter on December 10 and 11, 1991.[1] In that decision, the law judge held that respondent operated four flights for compensation or hire when he did not hold an air taxi

[1] Attached is an excerpt from the hearing transcript containing the oral initial decision.

or air carrier operating certificate issued under Part 135 of the Federal Aviation Regulations, and therefore violated 14 C.F.R. §§ 135.5, 135.293(a), and 135.293(b).[2] However, the law judge found that respondent's violations were not deliberate and did not show a lack of qualifications. Accordingly, he modified the sanction from revocation, as sought by the Administrator, to a 90-day suspension of respondent's commercial pilot certificate.

On appeal, respondent argues that: 1) the allegations pertaining to two of the four subject flights should have been dismissed as stale; 2) because three of the four subject flights were conducted pursuant to an aircraft lease agreement between respondent and Hyde County (North Carolina) Health Department, those flights did not constitute flights for compensation or hire; and 3) the 90-day suspension ordered by the law judge is too harsh a sanction. In his appeal brief, the Administrator challenges the law judge's credibility finding that respondent was well-intentioned and "making every effort to comply" with the regulations, and argues that the sanction of revocation should be reinstated. As further discussed below, both appeals are denied.

Applicability of stale complaint rule. We hold that it was not error for the law judge to consider the two flights which were the subject of the amendment to the complaint because, even though more than six months had elapsed between the time of the flights and the amendment, good cause existed for this delay.

[2] The text of these regulations is set forth in an Appendix to this opinion and order.

Accordingly, our stale complaint rule, 49 C.F.R. 821.33,[3] does not require dismissal of those allegations.

The original complaint in this case, served on February 5, 1991, contained (non-stale) allegations that respondent had operated flights for compensation or hire on March 27, 1990, and on May 10, 1990. The complaint was amended on October 14, 1991,

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[3] Section 821.33 provides, in pertinent part:

§ 821.33 Motion to dismiss stale complaint.

> Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for proposed action under section 609 of the Act, respondent may move to dismiss such allegations pursuant to the following provisions:
>
> (a) In those cases where a complaint does not allege lack of qualification of the certificate holder:
>
> (1) The Administrator shall be required to show by answer filed within 15 days of service of the motion that good cause existed for the delay, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.
>
> (2) If the Administrator does not establish good cause for the delay or for imposition of a sanction notwithstanding the delay, the law judge shall dismiss the stale allegations and proceed to adjudicate only the remaining portion, if any, of the complaint.
>
> * * *
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> (b) In those cases where the complaint alleges lack of qualification of the certificate holder:
>
> (1) The law judge shall first determine whether an issue of lack of qualification would be presented if any or all of the allegations, stale and timely, are assumed to be true. If not, the law judge shall proceed as in paragraph (a) of this section.
>
> (2) If the law judge deems that an issue of lack of qualification would be presented by any or all of the allegations, if true, he shall proceed to a hearing on the lack of qualification issue only, and he shall so inform the parties. The respondent shall be put on notice that he is to defend against lack of qualification and not merely against a proposed remedial sanction.

by joint stipulation of the parties,[4] to include allegations that respondent had operated two additional flights carrying a local health department official for compensation or hire on February 2, 1990,[5] and November 2, 1989. The record supports a finding that the Administrator did not become aware of these flights until June 1991 through a communication with the Director of the Hyde County Health Department.[6] Although respondent asserted at the hearing, without elaboration, that information about his "ongoing relationship" with Hyde County had been provided to the FAA more than six months prior to the amendment (Tr. 8), we find no indication in the record that the Administrator had reason to know about these flights prior to June 1991.[7]

After learning of the agreement between respondent and Hyde County in June 1991, the Administrator procured a subpoena duces

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[4] We note that the language in the jointly-submitted "Stipulation for Amendment to Complaint" in which respondent expressly waives any notice of proposed certificate action with regard to the additional charges and agrees to the inclusion of those charges at a hearing, could be construed as a waiver of respondent's right to raise the stale complaint issue with regard to the amended allegations.

[5] The amended complaint recited the date of the flight as February 2, 1990, but the evidence showed, and respondent admitted, that the flight actually occurred on February 8, 1990. (Vol. II, Tr. 8, 55.)

[6] See Tr. 58, and letter dated June 24, 1991, from William Boyd, Director of Hyde County Health Department, regarding flights provided to the county by respondent (Exhibit A-3).

[7] In this regard, we note that although respondent carried a Hyde County official on one of the two flights included in the original complaint, the FAA's investigation of that flight indicated that it had been arranged and paid for by a private individual, not by the county. Exhibit R-3, FAA's enforcement investigative file.

tecum in July 1991 (Exhibit A-6, p.1), and on September 16, 1991, the Hyde County Health Department provided the Administrator with records documenting the two flights here at issue (Exhibit A-6, p. 2-5). In our judgment, the Administrator acted with appropriate dispatch upon learning of the flights and, thus, the allegations added by the October 14, 1991 amendment are not subject to dismissal under our stale complaint rule. Administrator v. Richard, et al., 5 NTSB 2198 (1987). Accordingly, we need not address the Administrator's alternate argument that the stale complaint rule was inapplicable because the complaint presented an issue of lack of qualifications.

Were respondent's flights for compensation or hire?

Respondent admits that he operated the four passenger-carrying flights specified in the amended complaint, and that he was paid between $90 and $175 for each flight.[8] However, respondent disputes the Administrator's contention that these flights were operated for compensation or hire. Rather, he asserts that the payments he received were intended only to cover the cost of the aircraft rental, and that he provided a pilot (either himself or another pilot)[9] for free. (Tr. 216-7; Vol. II Tr. 57.) However,

[8] Each of the four flights involved transporting a passenger between Ocracoke Island, North Carolina, and the mainland of North Carolina.

[9] Respondent asserts in his appeal brief that there is no evidence that he piloted the November 2, 1989, flight he made for Hyde County. However, respondent admitted in his answer to the amended complaint and in discovery responses that he "operated" all of the flights here at issue, and testified that if he was unavailable to pilot a flight for Hyde County he would arrange for another pilot to do so. Thus, regardless of whether he

we have held that "obtaining . . . both a flightcrew and an airplane from the same source (a wet lease) is usually considered conclusive evidence of carriage for compensation or hire." Administrator v. Poirier, 5 NTSB 1928, 1930 (1987) (Board rejected argument that a cargo-carrying flight was a "rental-type arrangement and not a commercial operation for compensation or hire.") Each of the four flights here at issue involved such a wet lease.

Furthermore, even assuming respondent did not realize a profit from the flights (or even assuming he operated them at a loss), it is well-established that intangible benefits, such as good will or the expectation of future economic benefits, can render a flight one for "compensation or hire".[10] Regarding the three flights involving transportation of Hyde County Health Department officials, the law judge found (Vol. II Tr. 127-8), and respondent readily admitted, that respondent was actively pursuing a permanent business arrangement with the county whereby he would provide it with aircraft rentals and/or flight instruction. (Tr. 215, 218; Vol. II Tr. 61.) Indeed, the Hyde County flights were characterized as "trials" to determine the utility of using aircraft to transport county officials, such as

(..continued)
himself piloted the November 2, 1989, flight, his "operation" of that flight for compensation or hire would be contrary to 14 C.F.R. 135.5.

[10] See Administrator v. Blackburn, 4 NTSB 409 (1982), aff'd. Blackburn v. NTSB, 709 F.2d 1514 (9th Cir. 1983); Administrator v. Pingel, NTSB Order No. EA-3265, at n. 4 (1991); Administrator v. Mims, NTSB Order No. EA-3284 (1991).

building inspectors, to remote areas of the county. (Exhibit J-1.)

Thus, it is clear from the record that the three Hyde County flights at issue in this case were operated by respondent with the expectation of future economic benefits.[11] The extent to which respondent may have obtained intangible benefits from the fourth flight at issue (which did not involve a Hyde County official) is unclear from the record. However, we think that his acceptance of $100 for that flight is sufficient to render it for compensation or hire.

In sum, we agree with the law judge that, notwithstanding what he found were respondent's good intentions to comply with the regulations, the four flights were nonetheless conducted for compensation or hire, in violation of Part 135. (Vol. II Tr. 128.)

Sanction. Typical sanctions for a limited number of unauthorized flights for compensation or hire range from 20-day to 120-day suspensions.[12] However, the Administrator asserts that

[11] The law judge stated, in error, that respondent's attempt "to set up a future business of aircraft rental and/or pilot instruction which didn't require the 135 certificate . . . would take this case out of the consideration of the cases cited wherein the Board has said that even though you're . . . losing money, if you have a future interest, then" the flight is prohibited. (Vol. II Tr. 127-8.) We wish to emphasize that it is not relevant to our analysis of whether respondent's potential future business interests with the county constituted "compensation or hire" that respondent's anticipated future business activities would themselves have been exempt from Part 135 requirements.

[12] Administrator v. Carter, NTSB Order No. EA-3730 (1992) (30 days); Administrator v. Pingel, NTSB Order No. EA-3265 (1991)

revocation of respondent's pilot certificate is warranted in this case, citing Administrator v. Sexauer, NTSB Order No. EA-2645 (1987), where we upheld revocation for nine illegal flights, noting in particular the respondent's "disregard of the regulatory requirements of Part 135," and our conclusion that the respondent in that case, in view of his extensive aviation experience, knew or should have known that he needed a Part 135 certificate to carry passengers for compensation. The Administrator argues that respondent in this case similarly disregarded the regulations and must have known, in light of his aviation background (including running a Part 135 operation for many years), that his flights were in violation. The Administrator further challenges the law judge's finding that respondent in this case did not intentionally circumvent the regulations as "inherently incredible or inconsistent with the overwhelming weight of the evidence," and argues that this credibility finding should therefore be reversed.[13] We disagree.

Although we agree that someone with respondent's aviation background would be expected to know that flights operated for compensation or hire are illegal without a Part 135 certificate, we decline to second-guess the law judge's apparent conclusion

(..continued)
(120 days); Administrator v. Walton, NTSB Order No. EA-2747 (1988) (citing precedent for 20-90 days); Administrator v. Poirier, 5 NTSB 1928 (1987) (90 days); Administrator v. Blackburn, 4 NTSB 409 (1982) (60 days).

[13] The Administrator cites Administrator v. Blossom, NTSB Order No. EA-3081, p. 4 (1990); Administrator v. Powell, 4 NTSB 640 (1983); and Administrator v. Klayer, 1 NTSB 982 (1970).

(made after listening to respondent's testimony and observing his demeanor) that respondent did not believe the flights here at issue could properly be characterized as flights for compensation or hire. Thus, accepting the law judge's conclusion that respondent was attempting to comply with the regulations, we agree that a 90-day suspension is an appropriate sanction, and consistent with precedent.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal and respondent's appeal are denied;

2. The initial decision is affirmed;

3. The 90-day suspension of respondent's pilot certificate shall commence 30 days after the service of this opinion and order.[14]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[14] For the purpose of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).